IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 15/07/2003

CORAM

THE HONOURABLE MR.JUSTICE M. CHOCKALINGAM

CRL. APPEAL NO.1295 OF 2002

Varnakula Surya Flora .. Appellant

-Vs-

The Inspector of Police
N.I.B. C.I.D.
Chennai .. Respondent

This criminal appeal is preferred under Section 374(2) of Cr.P.C. against the judgment of the learned Principal Special Judge under E.C. and N.D.P.S. Act Chennai in C.C.No.70 of 2000 dated 12.8.2002.

!For Appellant : Mr.T.Sudanthiran
for Mr.P.Govindarajan

^For Respondent : Mr.V.Jaya Prakash Narayan
Govt. Advocate(Crl. Side)

:JUDGMENT

The appellant/accused No.1, who stood charged, tried along with the other accused under Section 8(c) r/w 21(c), 23(c) and 29 of NDPS Act, found A1 guilty under Section 8(c) r/w 21(c) of N.D.P.S.Act and sentenced to undergo 10 years R.I. and to pay a fine of Rs.1,00,000/- and in default of payment of fine to undergo further period of one year R.I., while the second accused was not found guilty in any one of the provisions and was acquitted, has brought forth this appeal.

2. The short facts necessary for the disposal of this appeal can be stated thus:

a) On 11.1.2000 at about 11.20 a.m., P.W.5 Gokul Sagar, who was working as Inspector of Police, Airport Security, Meenambakkam, Chennai, intercepted the appellant herein/accused No.1, who came to board the flight from Chennai to Srilanka, on suspicion. The appellant voluntarily handed over 827 grams of Brown sugar to P.W.2 Sumathy, Woman Police Sub Inspector. The contraband was concealed in a polythene packets around the waist of A1. P.W.2 handed over the same to P.w.5. He seized the contraband weighing about 827 grams of heroin powder and 4 packets of contraband under a cover of a mahazar,

Ex.P.3. P.W.3 Devaki, Woman Police Constable and P.W.4 Peter were present at that time. P.W.5 handed over the appellant along with seized contraband to P.W.6 Sankaran, Sub Inspector of Police, Meenambakkam Police Station at about 6.00 p.m. P.W.6 registered a case in Crime No.3/2000 under Sections 8(c) r/w 21, 23 of NDPS Act and 120 of I.P.C. and took up investigation. F.I.R. was marked as Ex.P.6.

b) P.w.6 arrested A1 at about 7.00 p.m. and recorded her confessional statement. The admissible portion of the confessional statement was marked as Ex.P.7. Pursuant to the same, he arrested the second accused and recorded his confessional statement. P.W.6 took 8 samples of the contraband weighing 10 grams each and number it as S.1 to S.8 and the samples were tied and sealed procedurally. The remaining contraband was tied and sealed. Then, he gave a requisition to the court for sending the samples of the seized contraband for chemical analysis under Ex.P.8. The information regarding the arrest of the accused were communicated to their relatives as required by law under Ex.P.9. He sent a report under Section 57 of N.D.P.S. Act to his superior officer as found under Ex.P.10. As per the orders of the Director General of Police, Tamil Nadu, the case was transferred to NIB CID, Chennai and all the connected records and documents were transferred.

c) P.W.1, Arulanandan, Analyst on receipt of the requisition letter from the Court along with sample packets of seized contraband S1 to S8 analysed the same and found that each of the sample contained narcotic substance. The analysis report was marked as Ex.P.2. Remaining contraband was sealed and sent to the court and the same were marked as M.O.1 to M.O.8. P.W.7 Murugan on receipt of the case records pertaining to Cr.No.3 of 2000, as per the order of the Director General of Police registered the same in NIB CID P.S.Cr.No.16/2000 and took up investigation and the F.I.R. was marked as Ex.P.12. He examined the witnesses and recorded their statements. On receipt of analysis report, he filed a charge sheet against the accused under Section 8(c) r/w 21, 23 and 29 of NDPS Act.

3) In order to prove the charges levelled against the appellant and the other accused, the prosecution has examined 7 witnesses and marked 12 exhibits and 12 M.Os. After the evidence of prosecution was over, both the accused were questioned under Section 313 of Cr.P.c. as to the incriminating circumstances found in the evidence of the prosecution witnesses, which the accused flatly denied the same as false. Two documents were marked on the side of the defence. No defence witnesses were examined. On hearing the rival submissions and scrutiny of the materials available, the trial court found the appellant/Accused No.1 guilty and sentenced her to undergo imprisonment as stated supra, but has acquitted the accused No.2 in respect of all the charges levelled against him. Hence, this appeal has been filed by the first accused/appellant herein.

4. Arguing for the appellant, the learned counsel with vigour and vehemence made the following submissions:

There is no proper or acceptable evidence either as to the arrest of A1 or the seizure of contraband as put forth by the prosecution. The evidence of P.Ws.2,4 and 5 when carefully scrutinised, would clearly falsify the case of the prosecution as to the factum of arrest and seizure. This would go to the root of the matter unless or until the arrest and seizure is proved by the prosecution strictly as expected by law and the case of this kind has got to be rejected by the lower court. The agency, namely, NIB CID has not strictly

followed the mandatory provision under Section 50 of NDPS Act. The evidence of the witnesses, documents including the F.I.R. and the report would clearly indicate that the appellant, when arrested at the time of seizure, was not informed of her right to be searched before a Gazetted officer or a Magistrate and the same has caused prejudice to the right of the accused. Hence, this would go against the case of the prosecution. It is highly doubtful whether P.W.4, who according to the prosecution was one of the witnesses of Ex.P.3, seizure mahazar was present at all and if his presence is disproved by the available evidence, then it would also cast a strong doubt on the alleged seizure of contraband. It is pertinent to point out that the alleged seizure has taken place at about 11.45 a.m., but A1 was arrested at about 6.00 p.m. and a case was also registered at 6.00 p.m. by P.W.6. Why such delay has been caused remain unexplained by the prosecution. This would also cast a doubt.

5. Added further the learned counsel that a perusal of the alleged confessional statement made by A.1 would clearly indicate that it was recorded at about 10.00 a.m., but the seizure of contraband according to the prosecution has taken place at about 11.45 a.m. This is one of the added circumstances to cast a strong doubt in the prosecution case. In view of the doubts, the lower court should have rejected the prosecution case as one false, and hence, in view of all the above, this appeal has got to be allowed.

6. Strongly opposing all the contentions of the appellant's side, the learned Government Advocate would submit that the interception of the appellant was made at about 11.45 a.m. P.W.2 has made a search in the presence of P.W.5 and contraband has been seized in the presence of P.Ws.3 and 4. It is true that there are minor discrepancies in the evidence of P.Ws.3 and 4. But, the evidence of P.W.3 has got to be taken into account. She has categorically deposed as to the factum of seizure. The appellant is unable to show any circumstance or reason why the evidence of P.W.3 should be rejected. It is true that the accused was arrested at 6.00 p.m. and pursuant to the same, a case was registered by Meenambakkam Police. The delay so caused has in no way affected the prosecution case. The confessional statement was recorded at about 7.00 p.m. as per the original records and the same was recorded by P.W.6, and hence, it casts no doubt. Under the stated circumstances, the judgment of the lower court has got to be sustained.

7. A careful analysis and a thorough appraisal of the evidence adduced by the prosecution and the materials available would lead to the acceptance of the appellant's case. The specific case of the prosecution as could be seen from the available materials was that on 11.1.20 00 when P.W.5 Inspector of Police attached to Airport Security, Meenambakkam, Chennai, was on duty at about 11.20 a.m. he intercepted A1 and under his supervision, P.W.2 Woman Police Sub-Inspector searched the appellant and the appellant was found to be in possession of 827 grams of heroin powder, which was seized under Ex.P.3, Mahazar in the presence of P.W.3 woman Police constable and P.W.4 an independent witness after following the procedural formalities as contemplated under Section 50 of the Act. Ex.P.3, seizure mahazar, as per the prosecution case, was the earliest document, which came into existence at about 11.45 a.m., on 11.1.2000 under which the contraband in question was seized from A.1. A perusal of Ex.P.3 would indicate that the seizure was made only by P.W.5 Inspector of Police and no where it speaks about the presence of P.W.2, Woman Police Sub-Inspector. But, the specific case of the prosecution

was that the seizure was made only by P.W.2 under the supervision of P.W.5. The names of two witnesses, namely, Peter and Ponpulu Karuppan, were mentioned under Ex.P.3 and the said Peter was examined as P.W.4 and the other witness, namely, Ponpulu Karuppan was not examined. Hence, it would be clear that out of two witnesses, the prosecution examined only one witness. When this seizure mahazar is viewed from the evidence of P.W.4, the witness in whose presence the same was made and P.W.5 by whom the seizure was made, it is highly doubtful whether such seizure was made at all. P.W.5 during his cross examination has clearly deposed as follows:

("mth;fSila eltof;ifapy; re;njfkhf ,Ue;jjhy; nrhjid bra;njhk;. vq; fsJ ghJfhg;g[gphptpy; bgz;fs; gFjpapy;> bgz; fhtyiu itj;J nrhjid bra;a Kw;gl;nlhk;. mg;bghGJ ehd; mq;F ,y;iy. cjtp Ma;thsh; Rkjpjhd; nghijg; bghUis vd;dplk; bfhz;L te;J bfhLj;jhh;.")

This part of the evidence would clearly indicate that P.W.5 was not at all present at the time of the alleged seizure, and thus, this would go against the contents of Ex.P.3 Mahazar that the contraband was seized by P.W.5. Insofar as the evidence of P.W.4 the alleged witness for the seizure is concerned, he has categorically deposed that when the seizure was made, both the accused were present at that time.

8. It is pertinent to point out that the alleged seizure has taken place at about 11.45 a.m. from the appellant and a case was registered at about 6.00 p.m. On her arrest, confessional statement was made. Pursuant to the confessional statement, A2 was subsequently arrested. The evidence of P.W.4 was that both the accused were present at that time when the contraband was shown to the witnesses. Hence, this part of the evidence of P.W.4 would totally falsify all the above facts, namely, the confessional statement of A1 and the subsequent arrest of A2. However, this part of the evidence would cast a doubt on the prosecution case. The seizure was made in the presence of the said witness by the officials and this would also affect the alleged seizure as put forth by the prosecution.

9. One more circumstance in this case is that, the officials have not strictly complied with the mandatory provision under Section 50 of the NDPS Act. The law under Section 50 of the Act would expect that at the time of seizure, a duty is cast upon the officials to inform to the accused that he has got a right to be searched before a Gazetted officer or a Magistrate as chosen by him and the law would further expect that the officials should inform the rights available to the accused. In the instant case, a perusal of the F.I.R. and the report sent to the officials would clearly indicate that the accused was informed about her rights as to where she would like to be searched, before a woman police officer or a Magistrate. This cannot be said to be a compliance of Section 50 of NDPS Act. Hence, mandatory provision under Section 50 of the NDPS Act has not been complied with. The provision under Section 57 of the Act that a detailed report as to the arrest and seizure has got to be given to the immediate superior immediately by the officer who effected the seizure, is not mandatory, but directory. In the instant case, the officials have not complied with the said provision also. According to the prosecution, seizure was made at about 11.45 a.m., but a case was registered at about 6.00 p.m. with a delay of about 6 hours and 15 minutes. Apart from the fact that this inordinate delay remained unexplained, but, it is surprising to note that how it has happened when the police station is situated in Meenambakkam.

10. Taking into consideration of all the facts and circumstances of the case, it would be highly unsafe to find the accused guilty under Section 8(c) r/w 21(c) of N.D.P.S. Act. Therefore, the appeal is allowed. The conviction and sentence imposed upon the appellant/accused No.1 by the trial court are set aside. The accused No.1 is acquitted of the charges levelled against her. The appellant/Accused No.1 is directed to be set at liberty forthwith, unless she is required in connection with any other case. Fine amounts, if any paid, shall be refunded to the appellant/Accused No.1.

15.07.2003
Index : Yes
Internet : Yes
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To
1. The Principal Special Judge under EC and NDPS Act,
Chennai-104
2. The Principal Judge, Chennai-104
3. The Superintendent, Central Prison(Women), Vellore
4. The Public Prosecutor, High Court, Chennai
5. The Dy. Inspector General of Police, Chennai-4
6. Mr.V.Jaya Prakash Narayan, Govt. Advocate(Crl. Side)
High Court, Madras
7. The Inspector of Police, NIB CID, Chennai.